

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 11, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1261-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LANCE TERRY KONRATH,

Defendant-Appellant.

APPEAL from an order of the circuit court for Waukesha County:
JOSEPH E. WIMMER, Judge. *Affirmed.*

SNYDER, J. Lance Terry Konrath appeals from an order denying his motion to vacate the seizure of his motor vehicle.¹ He now contends that the trial court erred when it issued an order specifying the vehicle to be seized without notifying him and then ruled that his subsequent objection to the seizure order was untimely. He also submits that the seizure and

¹ Konrath was convicted of a fifth offense of operating a motor vehicle while intoxicated, which required the court to seize a vehicle owned by him. See § 346.65(6), STATS.

forfeiture of his vehicle pursuant to § 346.65(6), STATS., violate the double jeopardy clause of the Fifth Amendment because it is a second, successive punishment for a single offense. We do not reach the merits of Konrath's challenge to the constitutionality of the forfeiture provisions. Instead, we conclude that the appeal is untimely and premature, and therefore affirm the trial court.

Konrath was convicted on June 9, 1995, of operating a motor vehicle while intoxicated, a fifth offense. After reaching a plea agreement with the district attorney's office, Konrath pled guilty and was sentenced.² The judgment of conviction included twelve months of jail time; a fine of \$2780; and revocation of his operator's license for three years. The judgment also stated: "COURT ORDERS THAT A VEHICLE BE FORFEITED. ..."

At the sentencing hearing, the court noted that under the statute Konrath was subject to forfeiture of a vehicle and asked, "You want to explain what vehicle?" Defense counsel suggested that "the statute actually requires the State to file a separate forfeiture complaint, in essence, to which he will have a chance to respond." The court continued:
THE COURT:Does he have a vehicle?

[DEFENSE
COUNSEL]:Yes, he does, Your Honor.

² The first plea hearing was suspended when the trial court discovered that neither Konrath nor his defense counsel was aware of the statutory requirement that a vehicle be seized and forfeited. The hearing was later resumed, with Konrath acknowledging that he was aware that he was subject to the vehicle forfeiture outlined in § 343.65(6), STATS.

THE COURT: Then the court will order that a vehicle be forfeited pursuant to the statute.

Approximately five weeks later, the court issued an order which authorized the seizure of a "1988 Pontiac Firebird, Wisconsin Registration Plate #LDP360, VIN #1G2FW21F1JL244946."

On September 21, 1995, the State requested that the court conduct a review hearing on the matter because the police had not yet located the vehicle.³ The review hearing was scheduled for October 19, 1995; after Konrath was notified of that hearing, he filed a motion to vacate the seizure order based on his contention that § 346.65(6), STATS., is unconstitutional. Without addressing the merits of Konrath's claim, the court denied the motion to vacate as untimely, and this appeal followed.

The court's determination that Konrath's motion to vacate was not timely is a question of law. We review such questions without deference to the lower court. See *Ball v. District No. 4 Area Bd.*, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984).

Section 346.65(6)(a)2, STATS., provides for law enforcement authorities to seize a motor vehicle "owned by a person ... who commits a violation of s. 346.63(1)(a) ... if the person ... who is convicted of the violation has 3 or more prior suspensions, revocations or convictions within a 10-year period

³ This review hearing was predicated on the fact that an officer of the Pewaukee police department suspected that Konrath was obstructing the department's attempts to seize the vehicle by claiming that "he did not know where it was, [yet] stat[ed] he did not sell it or trade it, nor had he reported it stolen."

that would be counted under s. 343.307(1).” In sentencing Konrath, the trial court properly included this legislatively-mandated penalty in his judgment of conviction. The trial court discussed this penalty with both Konrath and defense counsel; while defense counsel's comments at the sentencing hearing suggest that he believed that a separate forfeiture action would be required before a vehicle could be seized, the court plainly stated that it would “order that a vehicle be forfeited pursuant to the statute.”

Konrath's judgment of conviction clearly outlined that he was subject to the forfeiture provision. The subsequent court order merely “fleshed out” the description of the particular vehicle to be seized. While the statute does require a separate forfeiture hearing, the seizure of the vehicle actually triggers the forfeiture action. The statute provides in pertinent part: The district attorney of the county where the motor vehicle was seized shall commence an action to forfeit the motor vehicle *within 30 days after the motor vehicle is seized.*

Section 346.65(6)(c), STATS. Therefore, defense counsel was correct that Konrath would have an opportunity to challenge the forfeiture at a separate hearing. However, the forfeiture hearing and the due process guarantees which attach to it do not commence until the vehicle is seized.⁴

The State has statutory authority to seize an automobile pursuant to § 346.65(6), STATS. Once the seizure has been effected, the statute provides

⁴ It is not clear from the record whether the actual seizure of Konrath's vehicle has taken place. If it has not, our analysis suggests that this appeal could also be dismissed as not yet ripe for adjudication, as this court will not decide issues based on hypothetical or future facts. *See Pension Management, Inc. v. DuRose*, 58 Wis.2d 122, 128, 205 N.W.2d 553, 555-56 (1973).

the owner with a forfeiture hearing. Konrath agrees with the predicate step when he states that “seizure is the ordinary first step to commencement of the forfeiture action.” Konrath was orally apprised of the mandated seizure of his motor vehicle at the sentencing hearing and in writing in the judgment of conviction.⁵ Had he chosen to, he could have raised the issue of the constitutionality of the forfeiture of his motor vehicle through a timely appeal from the judgment of conviction. *See* § 974.02, STATS. That opportunity to appeal has passed; however, because the forfeiture action is a separate action *which is commenced after the vehicle is seized*, the statutes afford Konrath another opportunity to contest its legality.⁶

Section 346.65(6)(c), STATS., specifically provides for a timely forfeiture hearing following the seizure of the vehicle in question.⁷ At that

⁵ Our review of the record makes clear that there was substantial discussion among the court, Konrath and his counsel pertaining to the imposition of the forfeiture penalty.

⁶ Konrath argues that the timeliness of his appeal is governed by § 806.07, STATS., because he is seeking relief from a civil order. The “order” he refers to, however, is the court’s order which simply specified the vehicle to be seized. The civil proceeding and Konrath’s ability to seek relief from the forfeiture action will be commenced upon the seizure of the vehicle. As statutory support for this conclusion, the statutes provide that jurisdiction over the *seized property* lies within the county *where it was seized*. *See* § 346.65(6)(c), STATS.; *cf.* § 161.555(1) and (2), STATS., 1993-94 (providing that “[t]he circuit court for the county in which the property was seized shall have jurisdiction over any proceedings regarding the property”).

⁷ Section 346.65(6)(c), STATS., provides in pertinent part:

The district attorney of the county where the motor vehicle was seized shall commence an action to forfeit the motor vehicle within 30 days after the motor vehicle is seized. ... The forfeiture action shall be commenced by filing a summons, complaint and affidavit of the law enforcement agency with the clerk of circuit court. Upon service of an answer, the action shall be set for hearing within 60 days after the service of the answer.

hearing, Konrath may bring his challenges to the State's action. If the legality of the seizure and forfeiture is upheld, Konrath may then appeal. However, the trial court's dismissal of his present challenge as untimely and premature is affirmed.

By the Court. – Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.